BEFORE THE

SURFACE TRANSPORTATION BOARD

227857

Ex Parte No. 698

ESTABLISHMENT OF THE TOXIC BY INHALATION HAZARD COMMON CARRIER TRANSPORTATION ADVISORY COMMITTEE

Comments of

The Fertilizer Institute

The Fertilizer Institute ("TFI") hereby submits these Comments in response to the "Notice of Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee" ("Notice"), served by the Surface Transportation Board ("Board") in this docket on August 3, 2010. The Notice establishes a Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee ("Committee") and outlines the proposed structure of the Committee. The Board intends that the Committee produce a report that will include a recommended policy statement for further consideration by the Board concerning how to "balance the common carrier obligation to transport [toxic inhalation hazards ("TIHs")] with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo." Notice at 4. TFI commends the Board for its creativity in seeking to address this issue, but has some concerns as to whether a Federal Advisory Committee is a workable approach for accomplishing the Board's stated objectives.

I. INTEREST OF TFI

TFI is the national trade association of the fertilizer industry. TFI, which traces its roots back to 1883, represents virtually every primary plant food producer, as well as secondary and

micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many TFI members produce and/or consume anhydrous ammonia, which is one of the most widely used TIH commodities. Anhydrous ammonia provides essential nutrients to grow our nation's food supply and also has many industrial uses. Rail transportation is essential to the safe and reliable movement of anhydrous ammonia. Therefore, TFI members would be directly impacted by any recommendation of the Committee.

II. TFI COMMENTS

Within the context of the proposed Committee structure, the Board requests input on four specific issues: (1) What should be the appropriate scope of the Committee's mandate?; (2) How would the scope of the Committee's mandate affect its utility?; (3) What would be the optimum size of the Committee? and (4) How should the Committee's membership be allocated among various stakeholder groups to achieve a fairly balanced "cross section of those directly affected, interested, and qualified," as required by 41 C.F.R. 102-3.60(b)(3)? TFI believes that the Board needs to resolve issues surrounding the first and second questions in order to best answer the third and fourth questions.

TFI has two distinct concerns regarding the Committee's mandate that could constrain the utility of the Committee. These concerns relate to the antitrust implications of participating on the Committee and the authority of the Board to implement any recommendation that might come from the Committee. TFI also addresses the Board's other questions, although TFI believes that any such comments are premature, and could change, based upon how the Board might address the antitrust concerns.

A. Antitrust Issues

The Notice states that the Board "seeks to address the economic component of TIH transport" by "facilitat[ing] dialogue regarding and resolution of those economic concerns between and among TIH shippers and the railroads." Notice at 3. This dialogue would occur through a Committee comprised largely of both shippers and railroads, which are customers and vendors, respectively, and shippers which are competitors within a single industry (e.g. anhydrous ammonia producers, chlorine producers). The economic issues to be discussed would necessarily include rates, indemnification, insurance and other costs in order for any discussion to be useful or complete. Any discussion of these issues among buyers and sellers, and especially among direct competitors, raises antitrust issues that could significantly restrict the Committee's ability to effectively and comprehensively address the TIH liability issue.[1]

The Notice, however, does not acknowledge that antitrust issues exist, much less suggest how the Committee could function in light of antitrust restrictions. At the very least, the Board should obtain an opinion and guidance from the Department of Justice Antitrust Division and then re-solicit comments on the Committee from the public, because those issues, and any means required to address them, will undoubtedly influence any comments.

TFI raises these antitrust concerns not just as a hypothetical possibility, but as a real issue that TFI and its members have faced in two separate settings in which TIH issues have been the focal point. First, in 2006 and 2007, the Federal Railroad Administration ("FRA"), at the request of the rail industry, held conferences pursuant to 49 U.S.C. 333(d) to address TIH routing issues and the potential to reduce travel distances through commodity swaps and other commercial means. Although Section 333(d)(2) contains an express exemption from the antitrust laws for

[1] Because the Board also has proposed including two insurance industry representatives on the Committee, it also should consider any antitrust considerations from their participation.

such conferences, the Justice Department determined that the exemption applied only to the railroad participants. This determination forced FRA to restructure the conference into a collection of one-on-one meetings between FRA and each individual railroad and shipper. Unlike the Section 333 conferences, the Federal Advisory Committee Act does not extend antitrust immunity to any participant. Consequently, the antitrust issues that precluded collective meetings among the Section 333 conference participants are magnified by the current proposal.

Second, in 2008, TFI submitted a proposal to the Class I railroads under which TFI would be willing to search the insurance market to obtain as much excess insurance as possible. TFI offered to work with the railroads to share the cost of this insurance and make the maximum amount of insurance available to the rail industry in the event of an accident involving the release of anhydrous ammonia. Under its proposal, TFI asked the Class I railroads to carry primary insurance coverage up to a specified amount and TFI ammonia shippers would purchase excess coverage up to the maximum available in the insurance market. In return, TFI asked the railroads to provide a measurable reduction in rail rates and rate stability to reflect the insurance expense assumed by TFI members. The Class I railroads expressed a willingness to explore this proposal, but insisted for antitrust reasons that the discussions take place with each railroad individually. Ultimately, the negotiations broke down for several reasons, including how to address rate issues without running afoul of the antitrust laws.

The antitrust issues that have hindered prior efforts to address TIH matter will not simply vanish because the Board has proposed to create a Federal Advisory Committee. As a consequence of these antitrust issues, the scope of the Committee's mandate is likely to be significantly constrained. Moreover, stakeholders may be reluctant to participate on the Committee so long as doubts remain over the antitrust risks that they would be assuming.

B. Jurisdictional Issues

As to matters within its economic jurisdiction over railroads, the Board can only act within the constraints of existing law. Those constraints do not permit the Board to authorize limits upon the liability of common carriers for their own negligence. Yet, that is precisely the context in which the Association of American Railroads posed the issue in Ex Parte No. 677 (Sub No. 1), see Notice at 3, and the principal issue that has been at the center of the current debate.

In the Recommendation of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Congress amended 49 U.S.C. 20106 so that the Federal Railroad Safety Act no longer preempts all state law negligence claims. This legislative provision explicitly overturned Lundeen v. Canadian Pac. Ry. Co., 447 F.3d 606 (8th Cir. 2006), which immunized a railroad from liability for a rail accident involving the release of a TIH on the basis of federal preemption. Thus, Congress has enacted an express statutory provision to ensure that railroads are liable for damages resulting from accidental releases of TIHs due to a railroad's own negligence.

Moreover, one of the most well-established common law doctrines of common carriage is that "common carriers cannot secure immunity from liability for their negligence by any sort of stipulation." Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 184 (1913) ("Santa Fe").

This doctrine continues to be reflected in modern case law. In Union Pac. R.R. Co. v. U.S., 292 F. 2d 521 (Ct. Cl. 1961), the U.S. Court of Claims denied a claim by UP against the United States for indemnification of damages arising out of a TIH shipment of anhydrous ammonia, which the government had failed to disclose on the shipping documents as required by law. A third party prevailed in a personal injury suit that found both UP and the government to

be negligent. UP sought indemnification from the government for UP's payment to the third party in satisfaction of this judgment, based on a tariff provision that required shippers to indemnify UP for all loss or damage caused by dangerous goods that had not been fully disclosed to the carrier. The Court refused to permit UP to recover under this tariff provision because "[i]t is a well-settled principle of the law relating to common carriers that a carrier cannot by agreement relieve itself of liability for its own negligence." Id. at 243. See also, Bisso v. Inland Waterways Corp., 349 U.S. 85, 90-91 (1955) (discussing applicability of this principle to both common and contract towage) ("Bisso").

Many states also follow this doctrine. The seminal case cited often by state courts is Tunkl v. The Regents of the University of California, 383 P.2d 441, 443 (Cal. 1963), which held that an "exculpatory provision may stand only if it does not involve 'the public interest.'" The public interest is defined by the same factors that define common carriage. Id. at 444-46 (a business thought suitable for public regulation; performing a service of great importance and practical necessity to the public; holding out to serve the public; a decisive advantage of bargaining strength against any member of the public; a standardized adhesion contract of exculpation; and property that is subject to the risk of carelessness by the seller). See also, Hanks v. Powder Ridge Restaurant Corp., 885 A.2d 734, 743 (Conn. 2005) (surveying state decisions applying variations on the *Tunkl* factors); Restatement 2d Contracts, § 195 ("A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if...the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty.").

As a consequence of this established rule of law, there is no legal basis by which the Board could adopt, even upon a recommendation from the Committee, limits to a railroad's

liability for TIH incidents, or make such limits a condition upon a railroad's common carrier obligation to transport TIH.

C. Committee Composition and Structure.

As noted above, TFI believes that the Board should address the antitrust issues before it addresses questions regarding the composition and structure of the Committee, because any antitrust resolution is likely to influence comments regarding the structure and organization of the Committee. Nevertheless, because it is not clear how the Board intends to address the antitrust concerns, and whether there will be a subsequent opportunity for comment, TFI submits these preliminary comments based upon the current proposal.

The optimum size of the Committee is a balancing act between inclusiveness and functionality. While a large Committee probably is necessary to obtain a fair representation of all stakeholders, a smaller group is likely to function more effectively and efficiently. This may require a larger full Committee with smaller working sub-committees.

TFI agrees that, in order to ensure consensus, no recommendations should be adopted by the Committee without a majority vote of both the shipper and railroad stakeholders. This protection would not require equal representation among shipper and railroad interests. Because there are many more shipper stakeholders than there are railroad stakeholders, the Board could find it necessary and/or desirable to include more shippers than railroad members. So long as there is a majority requirement from both sub-groups for the Committee to adopt any recommendation, the Board should not feel constrained to restrict shipper representation to an equal number of railroad representatives.

It also is appropriate for the two largest groups of TIH shippers, anhydrous ammonia and chlorine shippers, to have the largest representation among TIH shippers. TFI further agrees that

academia and policy representatives could facilitate the activities of the Committee. Although the inclusion of insurance industry representatives makes some sense in light of TFI's own earlier efforts involving an insurance-based compromise, their inclusion also could be viewed as steering the Committee towards an insurance-based solution from the outset. While insurance industry input can be desirable, that does not necessarily mean that the industry's participation in the deliberations of the full Committee is needed.

TFI also urges the Board to consider the addition of TIH customers as members of the Committee. Because they ultimately may be the ones who pay the cost of any compromise, they should have a voice in the Committee's recommendations.

For the purpose of submitting recommendations with the full backing of the organizations that send representatives, it makes sense to get the buy-in from representatives at the Vice President or General Counsel level. However, that may not be the best level for performing most of the Committee's work. Lower level representatives may have greater knowledge of the facts and issues and more time to participate in monthly meetings over a 2-year period. Therefore, TFI believes it would be desirable to clarify that the official representatives may designate a stand-in or proxy to participate in working sessions on their behalf. All final Committee recommendations, however, would be based upon votes cast by each organization's official representative at the full Committee level.

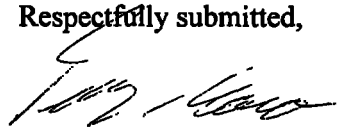
III. CONCLUSION

Any policy recommendation from the Committee is likely to fall within one of three broad categories: legislative, regulatory, and commercial. It is difficult to contemplate any commercial recommendation that would not implicate the antitrust laws, because the trade-offs of any negotiation would almost certainly have to address rail rates. Moreover, because the

Board would have no jurisdiction over a commercial recommendation (including insurance pools), there is no action that it could take to implement such a recommendation. A regulatory recommendation that would condition a railroad's common carrier obligation upon any form of liability limit or indemnification is beyond the Board's authority to implement. That leaves primarily a legislative recommendation. Although the Board cannot legislate in this area, it can recommend certain legislation to Congress.

Given all of these limitations upon what the Committee, and also the Board, can lawfully accomplish, TFI questions the utility of a TIH Federal Advisory Committee. This question cannot be adequately addressed, however, without first understanding what limits the antitrust laws would impose upon the workings of the Committee. Moreover, it is premature to define the scope and membership of the Committee until the antitrust issues have been thoroughly vetted. Therefore, TFI urges the Board to address this "elephant" in the room in order to be sure that a Federal Advisory Committee is workable and to clearly outline the legal boundaries within which the Committee can function.

Respectfully submitted,



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